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Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, SIERRA CLUB, AND LYNN CANAL CONSERVATION

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QUESTIONS PRESENTED

1. If the discharge of the slurry into the lake would violate Section 301 or Section 306 of the Clean Water Act, would that future violation authorize a court to set aside the permits issued by the United States Army Corps of Engineers, and the Record of Decision issued by the United States Forest Service, as "not in accordance with law," 5 U.S.C. § 706(2)(A)?

2. If a discharge comes within the scope of the Environmental Protection Agency's effluent limitations and satisfies the definition of fill material, may the discharger obtain permits under both Section 402 and Section 404 of the Clean Water Act? Must the discharger do so?

RULE 29.6 STATEMENT

The corporate disclosure statement included in the merits brief of Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation remains accurate.

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INTRODUCTION

In its Order of May 4, 2009, the Court directed the parties to address two questions: (1) whether a fill discharge permit purporting to authorize a discharge that would violate section 306 or 301 of the Clean Water Act must be set aside as "not in accordance with law" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A); and (2) whether a discharger can, or must, obtain a permit under both section 402 and section 404 of the Clean Water Act when a discharge that is subject to an Environmental Protection Agency (EPA) effluent limitation also meets the regulatory definition of "fill material." The answer to the Court's first question is "yes" and to both parts of the second question is "no."

The section 404 permit at issue in this case is "not in accordance with law." *Id.* It purports to authorize a discharge that, by the premise of the Court's question, would directly violate section 306 of the Clean Water Act. *See* 33 U.S.C. § 1316(e). It does so, moreover, on the basis of the legally erroneous conclusion that the discharge is exempt from that section. This Court's precedents and the plain language of the APA make clear that in these circumstances an agency's "actions" and "conclusions" must be set aside. 5 U.S.C. § 706(2).

Though the discharge here is both "fill material" and "process wastewater" subject to an effluent limitation, it cannot be permitted under both sections 402 and 404 of the Clean Water Act. Section 402 is prefaced with the clause, "Except as provided in sections [318] and [404]," 33 U.S.C. § 1342(a)(1), reflecting Congressional intent that a single discharge is

not subject to permits under both sections. When a single wastewater discharge implicates both an effluent limitation and "fill material," the plain language of the Act requires that the discharge must be permitted, if at all, under section 402. 33 U.S.C. §§ 1311(e), 1316(e), 1342(a)(1)(A). Here, because the effluent limitation allows no discharge, there can be no permit under either section. Coeur must find an alternative disposal method, as specifically intended by EPA when adopting the effluent limitations for ore processing mills.

ARGUMENT

I. THE CORPS' DECISION TO AUTHORIZE THE DISCHARGE IN THIS CASE MUST BE SET ASIDE AS "NOT IN ACCORDANCE WITH LAW."

A. The Section 404 Permit Is in Actual Conflict with Other Provisions of the Clean Water Act.

The answer to the Court's first question is "yes." Any decision by the Corps to authorize a discharge that would directly violate another section of the Clean Water Act—or any other law—must be set aside as "not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). "The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (emphasis in original).

Thus, it is irrelevant that the Corps itself does not administer effluent limitations under sections 301 or 306 of the Act. In *NextWave*, for example, this Court set aside a decision of the Federal Communications Commission (FCC) to cancel a license for broadband personal communications services on the ground that the cancellation violated a provision of the Bankruptcy Code, a statute the FCC does not administer. *See id.*; *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979) (holding that disclosure of documents under Freedom of Information Act by Defense Logistics Agency would be "not in accordance with law" if it violated the Trade Secrets Act).

That the Corps purported to authorize an actual violation of section 306 distinguishes this case from *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), cited by the Court in its first question. There, this Court held that a decision of the Pension Benefit Guaranty Corporation (PBGC) to restore a pension plan was not "arbitrary" or "capricious" on account of the agency's failure to consider the "policies and goals" of bankruptcy and labor laws. *See id.* at 645-47. The Court relied in part on the difficulty of requiring agencies to consider the policies and goals of all federal laws, noting that "there are numerous federal statutes that could be said to embody countless policies." *Id.* at 646.

The Court, however, pointedly distinguished the circumstances of the present case: "The Court of Appeals did not hold that the PBGC's decision *actually conflicted* with any provision in the bankruptcy or labor laws...." *Id.* at 645 (emphasis in original). Here, by contrast, the premise of the Court's question is that the discharge would actually violate sec-

tion 301 or 306. Where an agency's decision actually conflicts with another law, rather than merely fails to consider its general policies, *NextWave* provides the answer: The courts must set aside the action as "not in accordance with law."[1] 537 U.S. at 300 (quoting 5 U.S.C. § 706(2)(A)).

The permit must be set aside now under the APA even though the unlawful discharges would, of course, take place in the future. This is because the Corps' action here is not merely neutral as to Coeur Alaska's future compliance with section 306. Rather, the Corps issued a permit that specifically authorizes the company to discharge the slurry in a manner that the Court's question assumes would violate section 306. *See* J.A. 266a ("*You are authorized* to perform work in accordance with the terms and conditions specified below.") (emphasis added).

Moreover, the Corps explicitly based its decision on the erroneous conclusion that the discharge was exempt from any effluent limitations under sections 301 or 306. The rationale for this conclusion is found in the Regas memo of May 17, 2004, J.A. 144a-45a, which the Corps explicitly adopted in its decision to issue the Kensington fill material permit. *See* J.A. 342a ("This decision has been made in confor-

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[1] For the same essential reason, the Forest Service's Record of Decision approving the mine's operating plan, which is dependent upon discharge of wastewater slurry into Lower Slate Lake, must also be set aside. *See* J.A. 212a (approving use of lake for tailings disposal); J.A. 194a (describing method of discharging slurry). No party has argued in this Court that the Record of Decision can be sustained if the section 404 permit is set aside.

mance with the USEPA memorandum, entitled, 'Clean Water Act Regulation of Mine Tailings', dated May 17, 2004."); SER 901 n.89; *see also* J.A. 142a (Regas memo adopted by EPA in coordination with the Corps). The APA requires courts to set aside not only agency "actions" but also "findings" and "conclusions" that are "not in accordance with law." 5 U.S.C. § 706(2). The Corps' adoption of the "conclusions" of the Regas memo, and its issuance of a permit premised on those conclusions, must therefore be set aside.[2]

Indeed, the Corps does not claim authority to issue a section 404 permit for a discharge that would actually violate section 306. The Corps' own rationale for the permit is not that its issuance reflects mere agnosticism about whether the discharge would violate section 306, but that section 306 does not apply. Thus, even if there were a way for the Corps to issue a section 404 permit that was merely neutral on compliance with section 306, the permit at issue here could not be upheld on that basis because that was not the agency's own rationale. Under the venerable rule of *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943), the Court may not uphold an agency

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[2] The premise of both of the Court's questions for supplemental briefing is that the Regas memo is contrary to law. That memo is entitled to no deference because it ignores the plain language of sections 301(e) and 306(e) of the Act, 33 U.S.C. §§ 1311(e), 1316(e), and because it directly contradicts the agencies' stated intent at the time they adopted the 2002 fill rule, which the memo purports to interpret. *See* Brief for Respondents Southeast Alaska Conservation Council, et al. ("SEACC Br.") at 58-60; *see also infra* pp. 13-15.

action on the basis of a legal theory different from that on which the action was premised.[3] *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 25 (1998).

B. Section 404 Does Not Exempt the Discharge at Issue from Compliance with Other Provisions of the Act.

In determining that it was not arbitrary for the PBGC to disregard the policies of labor and bankruptcy laws, this Court held that the "most important" consideration was the plain language of the statute under which the agency acted. *PBGC*, 496 U.S. at 645. In that case, the relevant statute limited the agency's consideration to its duties "under this title." *Id.* at 646 (quoting 29 U.S.C. § 1347). In that circumstance, the Court held that the agency need not heed "policies" of other statutes if the agency's action did not "actually conflict" with another statute. *Id.* at 645.

Here, by contrast, the plain language of section 404 makes clear that the Corps cannot authorize discharges that would violate other provisions of the

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[3] The practical difference between the two theories is dramatic. Under the agencies' theory that section 306 does not apply to Coeur's discharge, the issuance of the fill permit reflects a determination that the discharge is lawful under the Clean Water Act. If, however, the fill permit merely reflected the Corps' view that the discharge complied with section 404 but remained subject to other sections of the Act, section 306(e) would prohibit the discharge, and Coeur would be subject to EPA enforcement action or a citizen suit if it attempted to begin discharging under the permit. Thus, under *Chenery*, the courts may not simply substitute a different rationale for the Corps' action here.

Clean Water Act. Section 404 has highly specific provisions exempting certain discharges from section 404 and other provisions of the Act, but none of them exempts the discharge at issue here from compliance with section 301 or 306. *See* 33 U.S.C. § 1344(f), (r); *see also NextWave*, 537 U.S. at 302 ("where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"). Section 404's enforcement provision—subsection (n)—makes explicit that other provisions of the Act remain applicable: "Nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section [309]." 33 U.S.C. § 1344(n). Section 309, in turn, authorizes EPA to take enforcement actions for violations of various provisions of the Act, including, explicitly, sections 301 and 306. *Id.* § 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1).

Nor is there any conflict between sections 404 and 306 that would require the Court to find that the former includes an implied exception to the latter. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *NextWave*, 537 U.S. at 304 (quoting *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). Section 404 is a grant of discretionary authority, while section 306(e) is an unqualified prohibition. *Compare* 33 U.S.C. § 1344(a) ("The Secretary may issue permits") *with id.* § 1316(e) ("it shall be unlawful"). In these circumstances, there is no conflict between the statutes—the discretionary authority (section 404) must be exercised in compliance with the prohibition (sec-

tion 306). *See NextWave*, 537 U.S. at 304 (discretionary auctioning authority of Communications Act must be conducted in compliance with Bankruptcy Code's prohibition against revoking licenses of debtors); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2536-37 & n.9 (2007) (discretionary agency authority must be exercised in compliance with the prohibitions of the Endangered Species Act); SEACC Br. at 26-27, 29.

C. The Corps Has Expertise to Recognize Discharges That Are Subject to Effluent Limitations.

PBGC's holding was also based in part on the fact that the labor and bankruptcy laws at issue there were, unlike the Clean Water Act in this case, completely outside the agency's "enabling Act." *PBGC*, 496 U.S. at 646. Here, the Corps' enabling authority (section 404) and the prohibitions against violating effluent limitations (sections 301(e) and 306(e)) are in the same Act.

Further, the Court in *PBGC* noted that the agency had no expertise in labor or bankruptcy laws. *See id.* Here, the Corps has long experience in recognizing when a proposed discharge is subject to an effluent limitation. Before the Regas memo, the Corps had, since at least 1977, refused to issue permits for proposed discharges that were subject to effluent limitations. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 445 (4th Cir. 2003) (noting that the Corps was authorized to grant permits for fill discharges "unless the fill amounted to effluent that could be subjected to effluent limitations," which the court described as "a

longstanding and consistent division of authority between the Corps and the EPA"); *id.* at 448 (noting that the Corps' interpretation of fill material excluded "effluent that could be regulated by ongoing effluent limitations"); J.A. 83a-84a.[4]

The Corps has also long recognized that it must heed other statutes when issuing—or denying—section 404 permits. The 404(b) guidelines are prefaced with this very observation. *See* 40 C.F.R. § 230.10 ("Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit."). It would be nonsensical to hold that the Corps has sufficient expertise to comply with statutes like the Marine

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[4] The Corps need not possess expertise to interpret and apply specific effluent limitations in specific situations, which is EPA's job, but merely to recognize when a discharge is from a source that is subject to these limitations. That is not an especially difficult task, because the effluent limitations describe with particularity the precise sources to which they apply. *See, e.g.*, 40 C.F.R. § 440.100(a)(2) ("The provisions of this subpart J are applicable to discharges from ... Mills that use the froth-flotation process ... for the beneficiation of ... gold ... ores...."). Because fill material permits normally involve the use of clean fill to build useful structures like docks and bridges, or buildings on wetlands, the question here arises only in the relatively unusual circumstance that an applicant proposes to discharge effluent from an industrial source as "fill material." Prior to the Regas memo, the Corps had for many years demonstrated its ability to identify and reject applications for discharges of effluents from sources subject to EPA effluent limitations. *See Kentuckians*, 317 F.3d at 445, 448; J.A. 83a-84a.

Protection, Research, and Sanctuaries Act of 1972 (administered by the Department of Commerce), *see id.* § 230.10(b)(4), but not with the very Act under which the Corps operates. *See also* 33 C.F.R. § 320.3 (listing statutes limiting Corps' permitting discretion). *PBGC*'s rationale regarding lack of agency expertise simply does not apply here.

D. The Corps' Permit Trenches on EPA's Authority.

PBGC also distinguished the situation—relevant here—where an agency's action "'trench[ed] upon the ... jurisdiction' of another agency." *PBGC*, 496 U.S. at 645 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962)). The Corps' permit here purports to authorize a discharge that the Court's question assumes would violate an effluent limitation adopted and administered by EPA. The permit is based on the legally erroneous conclusion that the effluent limitation does not apply to this effluent, eviscerating EPA's authority and obligations under the Clean Water Act.

That EPA consented to this transfer of jurisdiction is irrelevant, since EPA's disavowal of its jurisdiction was based on the same legal error. As discussed above, the Corps and EPA both adopted the Regas memo's conclusion that "fill material" discharges are exempt from section 301 and 306 effluent limitations. To the extent that conclusion was unlawful, as postulated by the Court's question, the Corps' use of it as the basis for authorizing discharges that violate EPA's effluent limitations trenches on EPA's jurisdiction.

Finally, to hold that the Corps is free to issue permits for discharges that would violate sections 301 or 306 would lead to untenable results. EPA would not be able exercise *permitting* authority over such discharges, due to the prefatory clause of section 402. *See* 33 U.S.C. § 1342(a)(1) ("Except as provided in sections [318] and [404], the Administrator may ... issue a permit...").[5] EPA could potentially go through the cumbersome process of vetoing the permit, but only if EPA found that the discharge would have "an unacceptable adverse effect" on various resources. *Id.* § 1344(c); *see* 40 C.F.R. Part 231 (EPA veto procedures). Alternatively, EPA could bring an action to enforce the violation of section 306, *see id.* § 1319, as could adversely affected private citizens. *See id.* § 1365(a)(1), (f). Such a regulatory regime would hamstring EPA's authority by depriving it of the most efficient way of preventing unlawful discharges (the exercise of permitting authority) and relegating it to the cumbersome, legally constrained veto process or post-hoc enforcement. Nor would such a reading of the Act be desirable from the standpoint of dischargers such as Coeur Alaska, who might spend millions of dollars to construct a new source ostensibly permitted by the Corps, only to have it shut down in an enforcement action or citizen suit for violating section 306 as soon as it started discharging. Such a system would be in no one's best interest and would not serve the purposes of the Act.

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[5] This point is discussed further below, in response to the Court's second question.

II. A SINGLE DISCHARGE IS SUBJECT TO ONLY ONE PERMIT.

The answer to both parts of the Court's second question is "no." EPA's authority to issue a permit under section 402 is prefaced with the limitation, "Except as provided in sections [318] and [404]...." 33 U.S.C. § 1342(a)(1). This plain language precludes EPA from issuing a 402 permit where the Corps *properly* exercises its discretion under section 404 to issue a permit for the same discharge. Further, requiring (or even allowing) two permits for the same discharge could result in inconsistent agency actions, if, for example, one agency authorized a discharge prohibited by the other or the two agencies imposed conflicting conditions on the same discharge. Thus, EPA and the Corps have interpreted the Act to mean that a single discharge requires only one permit. *See, e.g.*, J.A. 83a ("If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.") This is, at least, a reasonable interpretation of the preface of section 402(a)(1).

Moreover, under the regulatory definitions and agency intent in adopting them, it is not possible to separate the discharge into discrete components of process wastewater and fill material that could be permitted separately. "Process wastewater" is defined to include the solids present in the wastewater, *see* 40 C.F.R. § 401.11(f), (q) & (r), even in "very high" levels such as those from ore beneficiation mills. 47 Fed. Reg. 25,682, 25,685 (June 14, 1982); *see also* 33 U.S.C. §§ 1314(a)(4); 1311(b)(2)(E) (requiring EPA to adopt effluent limitations for suspended solids). Similarly, although the agencies' joint definition of

"fill material" focuses primarily on solids, it also includes mining slurries.[6] *See* 33 C.F.R. § 323.2(f); J.A. 48a. Thus, the entire wastewater slurry at issue in this case is both "process wastewater" subject to an effluent limitation and "fill material" under the new definition.

Regardless of which agency has permitting authority, it is clear for the reasons discussed in Part I, *supra*, that the agency may not authorize a discharge that conflicts with any provision of the Clean Water Act. The permit at issue here suffers from this defect, since it purports to authorize a discharge that would violate the zero-discharge performance standard for new ore mills and hence section 306(e). *See* 40 C.F.R. § 440.104(b)(1); 33 U.S.C. § 1316(e).

In other circumstances, where an applicable effluent limitation does not prohibit all discharges and the effluent contains suspended solids that bring it within the definition of "fill material," the Clean Water Act compels the conclusion that the only appropriate permitting authority is section 402. As discussed in SEACC's principal brief, the plain terms of sections 301 and 306 demand that any discharge comply with any applicable effluent limitations, without exception. *See* 33 U.S.C. §§ 1311(e), 1316(e). Section 404, however, provides no mechanism to apply or enforce those effluent limitations, and the Corps has no expertise or jurisdiction to do so. Section 402 is thus the only option. This conclusion is entirely consistent with section 404, which merely

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[6] Not all mining slurries or tailings are subject to effluent limitations. *See* SEACC Br. at 57-58.

grants discretionary authority that must be exercised in compliance with other mandatory or prohibitory provisions of the Act. *See supra* pp. 7-8.

EPA and the Corps foresaw and discussed the precise circumstance presented in the second question of the Court's supplemental briefing order when they adopted the revised definition of fill material in 2002. Consistent with the plain language of the Act, they stated repeatedly and consistently their intent that, when a discharge is both "fill material" and subject to an effluent limitation, the discharge would remain subject to effluent limitations and to section 402's permit requirements. *See* SEACC Br. at 11-15, 55-56. "If EPA has previously determined that a discharge is covered by an [effluent limitation guideline], that determination is not altered by today's rule." J.A. 46a; *see also, e.g.*, 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) ("Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under 402 of the CWA."); J.A. 47a-48a (same applied specifically to mine tailings and slurries); J.A. 83a-84a (same applied to mining wastes addressed in 1986 Memorandum of Agreement). Petitioners and the government point to various general statements about mining wastes, fill material, and section 404, but none of those statements specifically addresses the circumstance where a single discharge meets the definition of fill material and is also subject to an effluent limitation. Each time the agencies addressed that situation, they said the same thing. The agencies' statements upon promulgation of the fill rule reflect a sound interpretation of the Act and should be given effect.

That section 402 is the exclusive permitting program for enforcing effluent limitations is not contradicted by the statement in the fill rule's preamble, repeatedly cited by Petitioners, that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. For decades, EPA has applied effluent limitations to industrial wastewater that, left untreated, would meet EPA's longstanding effects-based definition of "fill material." *See* J.A. 27a; SEACC Br. at 7-9, 44-45, 49-50. EPA's effluent limitations require the use of settling ponds (not in navigable waters) and other technologies that can remove all or nearly all of the suspended solids before they are discharged to navigable waters. *See* SEACC Br. at 9, 44-45. Thus, although the *untreated* effluent from these sources would be "fill material" under EPA's definition, wastewater discharges allowed by section 402 permits typically have only small components of solids that would not constitute "fill material."[7] Read in this light, the assertion that EPA has never regulated fill material through effluent limitations, though potentially confusing, is consistent with EPA's longstanding practice.

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[7] For example, the untreated effluent from ore beneficiation mills generally has "very high suspended solids levels," 47 Fed. Reg. at 25,685, in this case 55% solids by weight and 30% by volume. *See* SEACC Br. at 3-4. But, through the application of best technologies, EPA has set effluent limits of 30 milligrams per liter daily maximum for old mills, 40 C.F.R. § 440.102(b), and zero discharge for new mills. *Id.* § 440.104(b)(1). Thus, while the raw effluent is "fill material," any permitted discharge to navigable waters is not.

While the zero-discharge limit applicable to new ore processing mills precludes a permit under either permitting program in this case, it does not mean the mine cannot operate. It means that the operator must select a feasible alternative wastewater disposal method, *see* SEACC Br. at 11, 19, which is exactly what EPA intended when it adopted the zero-discharge limit in 1982. *See id.* at 9. If EPA wished to repeal this requirement, which of course is within the agency's power, it was required to say so and to supply a "reasoned analysis." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, No. 07-582, slip op. at 11, 2009 WL 1118715, at *9 (U.S. April 28, 2009). In the present case, the agencies have taken a position that they may simply disregard EPA's effluent limitations—"rules that are still on the books." In adopting the new fill material definition, they never expressed an intent to repeal or alter those rules, and in fact they stated just the opposite. In the absence of a reasoned analysis in the rulemaking record for the alleged reversal of position, or even an acknowledgment of it, the effluent limitations must be treated as effective.

In short, a single discharge may be eligible for a permit under section 402 or section 404, but not both. Where, as here, EPA has adopted a zero-discharge limit for an industrial source, no permit is available under either provision, and *any* permit that purports to authorize such a discharge is, necessarily, not in accordance with law. For sources subject

to effluent limitations that allow some discharges, section 402 is the only available permit program.

Respectfully submitted,

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